Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LEONARD A. PELULLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Harrison v. United States*, 392 U.S. 219 (1968), what is the standard of proof to be met by the government when it seeks to prove that a defendant's first trial testimony was not induced by a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and thus is admissible in the retrial caused by the *Brady* violation?

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OPINIONS BELOW

The opinion below is reported at 173 F.3d 131 (3d Cir. 1999). It is reproduced in the Appendix at 1-37a. Rehearing was denied, in an unpublished order. App. 38-39a. The opinion of the district court is reported at *United States v. Pelullo*, 6 F. Supp. 2d 403 (E.D. Pa. 1998). It is reproduced in the Appendix at 39-94a.

STATEMENT OF JURISDICTION

Judgment was entered by the Third Circuit Court of Appeals on March 18, 1999. App.1a. Rehearing and rehearing *en banc* were denied on April 30, 1999. App.37a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Constitution, Fifth Amendment

> No person . . . shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The petitioner, Leonard A. Pelullo, has been tried four times on the same multiple count wire fraud and RICO violations. The theory of the government's case has been that the petitioner diverted to his personal use monies loaned to his company to refurbish art deco hotels in Miami Beach, Florida.

Petitioner's first trial conviction was reversed on all counts except Count 54. *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992). He was retried and convicted on the reversed counts. The Court of Appeals again vacated the conviction. *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994). Pelullo testified in both of those trials.

Prior to his third trial, the government gave Pelullo *Brady* material, which had not been previously disclosed. After receiving the *Brady* material, Pelullo moved to vacate the Count 54 conviction. The District Court denied that motion.

Pelullo was then tried a third time on the other counts. Pelullo did not testify. That trial resulted in a deadlocked jury. He was then tried a fourth time. Again, he did not testify. But at the fourth trial the government introduced and read to the jury part of his testimony at the first trial. He was convicted. On appeal from the fourth trial conviction, Pelullo contended that his first trial testimony should not

have been used because that testimony was induced by the government's *Brady* violations; that without the subsequently revealed *Brady* evidence, Pelullo's only way to impeach the government witnesses at the first trial was to testify. He also sought review of the denial of his motion to vacate the Count 54 conviction.

The Court of Appeals agreed that there had been a *Brady* violation and granted a new trial on Count 54. *United States v. Pelullo*, 105 F.3d 117, 124 (3d Cir. 1997). As to the other counts of conviction, which the government obtained at the fourth trial using Pelullo's first-trial testimony, the court remanded for an evidentiary hearing under *Harrison v. United States*, 392 U.S. 219 (1968). At that hearing, the government had to prove "whether Pelullo would have testified in the first trial anyway even if the government had complied with its Brady obligations." 105 F.3d at 125; *see* App. 8-9a. No standard of proof was prescribed. *See* App. 10-11a.

On the remand, the District Court found that Pelullo's decision to testify at the first trial was not caused by the *Brady* violation. App. 93-94a. The court below affirmed:

> We hold that the District Court did not clearly err in concluding that the government established *by a preponderance* "that Pelullo's testimony at the first trial was obtained by means sufficiently

> distinguishable from the *Brady* violation to be purged of any taint arising from that violation."

App. 16a (emphasis supplied). Pelullo had contended in the district court, and on appeal, that pursuant to *Harrison* the proper standard of proof was "beyond a reasonable doubt," not preponderance of the evidence.

The Court of Appeals rejected Pelullo's contention. It likened the *Harrison* inquiry to exclusionary rule inquiries, and concluded that the preponderance of the evidence standard sufficed. App. 13-16a. It then addressed the "seven contested findings, which provide the primary rationales for the District Court's conclusion that Pelullo would have testified even in the absence of a *Brady* violation." App. 18a. The court acknowledged "the force of Pelullo's response to the district court's (and the government's) arguments on [one] point" (App. 26a); and that Pelullo's arguments about another finding were "compelling" (App. 20a); and that "this is not the only inference that the District Court could have drawn from these facts" (*id.* at 22a); and that as to another view of a fact, that "an alternate reading is possible" (*id.* at 31a); and that "the District Court's findings of fact were not uniformly correct. . . . " App. 32a.

Nevertheless, the court concluded: "we cannot say that the District Court clearly erred when it found

that the government proved by a preponderance of the evidence that Pelullo would have testified during the first trial even if the withheld material had been made available to him." App. 32a.

The question presented is whether the preponderance of the evidence standard was the proper standard for the *Harrison* inquiry following a *Brady* violation. The standard of proof almost always makes a difference; here the opinion below leaves no doubt that the outcome would have been different if the government had to meet the beyond a reasonable doubt test.

REASONS FOR GRANTING THE WRIT

Depending upon how one reads *Harrison v. United States*, 392 U.S. 219 (1968), the decision below either conflicts with *Harrison*, or presents an important question left unanswered by *Harrison*.

1. The Conflict

The defendant in *Harrison* "testified only after the government had introduced into evidence three confessions, all wrongfully obtained. . . ." 392 U.S. at 222. The Court framed the Fifth Amendment issue:

> The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.

Id. at 223.

The Court held that since the government had "illegally placed [Harrison's] confessions before the jury," the Government must show that its illegal action did not induce his testimony." *Id.*, at 225. The important issue presented in this petition is the standard of proof for that showing by the government: beyond a reasonable doubt, or preponderance of the evidence?

Harrison's statement of what the government must show cited *People v. Spencer*, 424 P.2d 715, 722 (1967); and ("*compare*") *Chapman v. California*, 386 U.S. 18, 24 (1967). *Harrison*, 392 U.S. at 225, n. 12. *People v. Spencer* used the beyond a reasonable doubt standard of proof: the state "fail[ed] to dispel beyond a reasonable doubt the possibility that the defendant took the stand in an attempt to mitigate" the effect of the illegal confession. 424 P.2d at 724. Likewise, *Chapman* requires that the "beneficiary of a constitutional error" has the burden to demonstrate

"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

Harrison's citation of *Spencer* and *Chapman* reasonably supports the conclusion that "beyond a reasonable doubt" is the proper standard for measuring whether a defendant's trial testimony was induced by the Government's constitutional violations.

If our reading of *Harrison* and its references to *Spencer* and *Chapman* is right, the use of the preponderance standard in the court below was wrong, and conflicts with *Harrison*.

2. The Important But Unanswered Question

The court below took a narrow view of *Harrison's* message: "[T]he *Harrison* court gave no indication that it wished to adopt *Spencer's* standard of proof analysis, citing *Spencer* only for the proposition that the government bears the burden of disproving causation. We refuse to read more into the Court's decision to cite *Spencer*." App.13a n.3. Instead, the court below, "by virtue of the fact that *Harrison* did not explicitly set out the government's standard of proof," concluded that the testimonial causation inquiry should be likened to suppression hearings and that preponderance of the evidence should be the applicable standard of proof. App.13a.

Thus, the decision below concluded that the question now presented was not answered by this Court. The Court should provide a clear answer to the standard of proof question, if *Harrison* did not already do so (as we maintain) by its references to *Spencer* and *Chapman*. If *Harrison* only decided *what* the government must prove, it is important that the Court answer *how* the government must discharge its burden, especially in the context of *Brady* violations. Because the government's *Brady* obligation exists in every criminal case, all the consequences of a *Brady* violation should be clearly established by this Court.

3. Another Conflict or Unanswered Question: Do the Exclusionary Rule Cases Govern the *Harrison* Inquiry *vis-a-vis* a *Brady* Violation?

The court below analogized the *Harrison* inquiry to exclusionary rule inquiries:

> We believe the Court in *Harrison* mandated what is essentially an exclusionary rule inquiry where there appears to be a link between a constitutional violation and a defendant's subsequent decision to take the stand.

* * *

> In light of *Harrison*'s exclusionary rule framework, and by virtue of the fact that *Harrison* did not explicitly set out the government's standard of proof, we look to other exclusionary rule cases for guidance on the proper standard of proof.

App. 12-13a.

The exclusionary rule analogy does not work in the context of a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83 (1963), is aimed at assuring a fair trial. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). The rules governing suppression of evidence or confessions that are illegally obtained have a different purpose:

> [T]he exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.

Lego v. Twomey, 404 U.S. 477, 489 (1972).

A new trial granted for a *Brady* violation means that the government had withheld probative evidence relating to guilt or innocence. Requiring the government to prove beyond a reasonable doubt that the defendant would have waived his Fifth Amendment privilege against self-incrimination and testified, even if the government had not withheld that evidence, would make the retrial a fair reprise of the first trial. *See Chapman*, *supra*, p. 6. The beyond a reasonable doubt standard of proof serves the purpose sought by *Brady* – a fair trial – a purpose distinct from that served by the exclusionary rule.

If *Harrison* already requires the first trial testimony inquiry to meet the reasonable doubt standard, there is conflict. If *Harrison* does not set a standard, then the decision below presents two important but unanswered questions: (1) What is the standard of proof, and (2) is the *Harrison* standard of proof in a *Brady* violation case (where the defendant was unaware at trial of the constitutional violation) different from that applied when a confession has been improperly admitted by the trial court? [1]

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[1] Justice Harlan's dissent in *Harrison* illustrates the difference we posit. He viewed trial testimony as a knowingly chosen trial strategy risk: "believing that error has been committed that will result in reversal on appeal, they must nevertheless present a defense and in so doing may help the other side on retrial." 392 U.S. at 228 (Harlan, J., dissenting). A *Brady* violation is different because the defendant, making the decision to testify, does not know that the government has withheld

CONCLUSION

This Court should grant certiorari to either resolve the conflict between the decision below and *Harrison*, or to answer the important question or questions left open by *Harrison*.

Respectfully submitted,

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evidence. That defendant cannot be said to have knowingly and intelligently "waive[d] his privilege against compulsory self-incrimination with respect to the testimony he gives." *Harrison*, 392 U.S. at 222.